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No. 87-751

In the Supreme Court of the United States

OCTOBER TERM, 1988

FRANK C. CARLUCCI,
SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondent's basic position in this case is deeply ironic. By contending that 5 U.S.C. 7532 and 50 U.S.C. 833(a) constitute the exclusive statutory procedures for removing a federal employee for national security reasons, respondent would relegate federal employees to procedures affording *less* protection than they receive under ordinary "for cause" removal provisions. Respondent never explains why this result would be in the interests of federal employees—other than those in the unique position of having already received a "for cause" hearing. Nor does respondent explain why this result would be in the interests of federal agencies, which must involve

the agency head directly in removals taken under the emergency procedures of Section 7532 and Section 833(a).

Respondent's position would not only disadvantage both federal employees and federal agencies, it finds no support in either the language or history of the relevant statutory provisions. Sections 7532 and 833(a) were enacted to enable agencies to bypass statutory and other protections of employees where national security considerations require; they are not exclusive procedures for removing on security grounds someone who could otherwise be removed pursuant to NSA regulations governing "for cause" removals. Thus, they do not circumscribe the authority of the Director of NSA to remove an employee for cause where the cause is related to national security.

1. Respondent makes two preliminary arguments designed to pretermit the question on which this Court granted certiorari. Ultimately, however, both arguments *presuppose* the correctness of respondent's position that Sections 7532 and 833(a) constitute the exclusive source of authority to remove an employee for national security reasons. As such, respondent's preliminary arguments merely beg the question presented for this Court's review.

a. First, respondent asserts (Br. 12-17) that NSA may not rely on its "for cause" removal provisions, even if it had the authority to do so, because NSA never invoked its "for cause" removal procedures in this case. That claim is incorrect, as we demonstrate in our opening brief (at 22-24). Respondent received a "notice of proposed action to remove you * * * in accordance with the provisions of NSA/CSS Personnel Management Manual (PMM) 30-2, Chapter 370" (C.A. App. 82). Chapter 370 sets forth in Section 3 (Pet. App. 38a-43a) the standards and procedures for removing an employee and specifically provides that an employee may be removed pursuant to that section only for "such cause as will promote the efficiency of the service" (*id.* at 39a). NSA expressly relied upon that removal authority (and no other) and fully complied with its procedures governing "for cause" removals (see Pet. Br. 23-24; Pet. App. 19a).[1]

[1] Respondent contends (Br. 18-19 & n.10) that the administrative proceedings focused only on whether his continued access to SCI was clearly consistent with the national security, not on whether loss of a security clearance constituted cause for his removal. But the notice of proposed removal clearly drew the connection between the two: "I am unable to find that your continued access to sensitive compartmented information is clearly consistent with the national security. You fail to meet the statutory standards for employment in a critical and sensitive position that requires access to highly classified information. *Therefore,* I am proposing that you be removed from your position with the National Security Agency." C.A. App. 83 (emphasis added). In light of the fact that continued clearance for access to SCI is a statutory requirement of employment at NSA, no more detailed discussion of the "cause" for respondent's removal was necessary. Once it was determined that his clearance had to be revoked, there was nothing left to "address[] administratively" (Resp. Br. 19 n.10).

Respondent's related contention (Br. 16-17) that we did not argue in the lower courts that respondent was removed pursuant to NSA's "for cause" regulations is simply baffling. The authority of NSA to dismiss employees pursuant to Chapter 370 where the cause for removal is related to national security has been the focal point of this litigation from its inception. See, *e.g.*, C.A. App. 24-25 (Defendant's Statement of Material Facts as to Which There is No Genuine Issue); Appellees' Br. 6-7; 37; 47-48. It was also the question expressly decided by the district court (see Pet. App. 19a-20a) and, albeit without citing the applicable "for cause" regulations, by the court of appeals (*id.* at 10a).

The "cause" for respondent's removal was, of course, related to national security: clearance for access to sensitive compartmented information (SCI) is a continuing statutory requirement for employment at NSA, and the determination that respondent's access to SCI was no longer "clearly consistent with the national security" (50 U.S.C. 831) therefore required respondent's removal. But respondent's assumption that NSA cannot have properly invoked its "for cause" removal procedures, because the cause for removal involved national security, simply assumes, without proving, that Section 7532 establishes the exclusive mechanism for removing NSA employees on grounds related to national security.

b. Respondent also argues that even if Section 7532 is not, by its own terms, an exclusive mechanism for removing employees for reasons related to national security, it has been rendered the exclusive mechanism for any such removals of NSA employees by various nonstatutory sources that require such removals to be made pursuant to Section 7532. Respondent cites (at 18-20, 38-40) three nonstatutory sources that allegedly limit the authority of the Director of NSA in this way: Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953 comp.), DoD Directive No. 5100.23 (May 17, 1967), and Chapter 371 of *NSA Personnel Management Manual 30-2* (Aug. 12, 1980). None of these sources, however, has the desired effect.

Executive Order No. 10,450 merely implements and extends to the heads of all agencies the summary suspension and termination authority granted by the predecessor of Section 7532 (see Pet. Br. 5 n.4). It does not mandate that that authority, and no other, be used in all removals relating to national security.

To the contrary, it provides that the head of an agency shall use this authority to suspend and remove an employee "if he deems such suspension necessary in the interests of the national security" and further "determine[s] such termination necessary or advisable in accordance with [Section 7532]." Exec. Order No. 10,450, § 6, 3 C.F.R. 937-938 (1949-1953 comp.). As this Court stated in *Cole* v. *Young*, 351 U.S. 536, 543-544 (1956), employees may be dismissed for cause based on doubts about their loyalty without invoking the summary removal authority implemented in Exec. Order No. 10,450. Indeed, the Court in that case stressed (351 U.S. at 546) that "[i]n the absence of an immediate threat of harm to the 'national security,' the normal dismissal procedures seem fully adequate and the justification for summary powers disappears." See Pet. Br. 36.

In DoD Directive 5100.23 (C.A. App. 60-65), the Secretary of Defense delegated his appointment and removal authority under the 1959 NSA Act to the Director of NSA. The Secretary of Defense, however, reserved to himself certain specific statutory removal authorities, including the summary dismissal power granted by 5 U.S.C. 7532.[2] But the Secre-

[2] The Director of NSA was delegated the authority to "[a]uthorize the suspension, but not to terminate the services of an employee in the interests of national security in positions within the NSA, *in accordance with the provisions of 5 U.S.C. * * * 7532, [and] Executive Order 10450*" (DoD Directive 5100.23 ¶ 10 (emphasis added)). Respondent quotes (Br. 19) this provision, but omits the italicized language, which clearly indicates that only the summary termination authority in Section 7532 has been withheld, not all authority to terminate employees for reasons relating to national security. The President has recently designated NSA an agency within the meaning of Section 7532 and thus

tary did not impose any limitation on the Director's authority to remove employees for "cause" whenever the cause is related to national security. That inference would follow, again, only if one accepted respondent's principal argument that Section 7532 is the exclusive mechanism for such removals.

Similarly, Chapter 371 of *NSA Personnel Management Manual 30-2* (PMM 30-2) prescribes policies and procedures for all suspensions and terminations pursuant to Section 7532 and Exec. Order No. 10,450. See PMM 30-2, ch. 371.1-2(a) and (b). Thus, unless Section 7532 is an exclusive mechanism for removals related to national security, NSA is not precluded by Chapter 371 from removing for cause under Chapter 370 an employee who loses a security clearance required by his position.

For the same reason, respondent is wrong in contending (Br. 40) that "in proceeding under Chapter 370 rather than Chapter 371 of its personnel regulations, NSA did not adhere to its own regulations," and his reliance on this Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), is therefore misplaced. In *Vitarelli*, the Secretary of the Department of the Interior had established procedural safeguards governing all security discharges. The Secretary sent a notice of dismissal to employee Vitarelli citing those regulations, as well as Exec. Order No. 10,450 and the predecessor of Section 7532 as the basis for the dismissal. The agency, however, then failed to afford Vitarelli the procedural rights guaranteed by its own regulations. The Court accordingly held that "such dismissal was illegal and

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granted to the Director of NSA the summary termination authority in Section 7532. 53 Fed. Reg. 26023 (1988).

of no effect" (359 U.S. at 545) because the secretary "was bound by the regulations which he himself had promulgated" (*id.* at 540). The Court noted (*id.* at 539) that even though Vitarelli was in the excepted service and thus could have been "discharge[d] summarily * * * without the giving of any reason," the Secretary relied on his regulations governing security discharges and thus "was obligated to conform to the procedural standards he had formulated * * * for the dismissal of employees on security grounds."

In the instant case, by contrast, NSA never purported to rely on Chapter 371, or Exec. Order No. 10,450, or Section 7532 in discharging respondent. To the contrary, NSA repeatedly informed respondent that his discharge was pursuant to the "for cause" procedures set forth in Chapter 370. Whether NSA was permitted to proceed under Chapter 370 in light of the fact that the cause for respondent's removal was related to national security is, of course, the question presented for review. But Chapter 371, which merely implements Section 7532, does not answer that question. Only if Section 7532 itself circumscribes the authority of NSA to dismiss employees for cause would the procedures of Chapter 371—which do not, in any event, go beyond those already required by Section 7532 (see PMM 30-2, ch. 370.3)—be required in this case.

2. On the merits of the question presented, respondent contends (Br. 22-23) that to permit the Director of NSA to dismiss an employee for cause where the cause for the dismissal is related to national security would constitute a "repeal by implication" of the "express requirements" of Section 7532. Respondent, however, simply ignores the per-

missive language of Section 7532, which states that an agency head "may" suspend and thereafter remove an employee in specified circumstances. Nowhere does Section 7532 prescribe a mandatory procedure; it may be invoked "[n]otwithstanding other statutes," but nothing in Section 7532 purports to preclude removal actions taken pursuant to "other statutes." See Pet. Br. 28-29.[3]

[3] Clearly, if Section 7532 is used by the agency to suspend and remove an employee then the employee "is entitled, after suspension and before removal, to * * * a hearing, at the request of the employee, by an agency authority duly constituted for this purpose" as well as "a written statement of the decision of the head of the agency" (5 U.S.C. 7532 (c)(3)(C) and (E)). But the fact that a hearing and a decision by the head of the agency are mandated whenever Section 7532 is invoked has nothing to do with whether invocation of Section 7532 is mandated whenever an employee is removed for reasons relating to national security. Thus, the legislative history discussed by respondent (Br. 23-34) to show the importance that Congress attached to the requirements of a hearing and a decision by the head of the agency is simply irrelevant, since those requirements only come into play when Section 7532 is invoked.

Equally irrelevant is respondent's attempt (Br. 27-29) to demonstrate that Section 7532 *could* have been invoked for the "[u]nintentional minor indiscretions" that respondent committed. The question at issue is not whether Section 7532 is a possible avenue for removing an employee who loses his security clearance, but whether it is the only avenue. As we show in our opening brief (at 29-32), the legislative history indicates that Section 7532 was not intended to be an exclusive procedure for removing employees who pose a security risk; it was to be used "only in the exceptional cases where no other speedy and sure method is available to protect the national security." *Hearing on S. 1561 and S. 1570 Before a Subcomm. of the Senate Comm. on Armed Services*, 80th Cong., 2d Sess. 2 (1948) (statement of Mark Edwin Andrews, Assistant Secretary of the Navy).

In lieu of any discussion of the language of Section 7532, respondent relies (Br. 21-22) on 50 U.S.C. 833 as evidence that Congress considered Section 7532 an exclusive procedure for terminating employees on national security grounds. But as we explain in our opening brief (at 25-26 & n.14), Section 833 shows precisely the opposite. The preamble to Section 833 provides that the Secretary of Defense's authority under that provision may be exercised "[n]otwithstanding sections 7512 and 7532 of title 5." Section 7512 contains the "for cause" dismissal protections of the CSRA, protections that are due by statute to preference-eligible NSA employees and that, with the exception of MSPB review, have been afforded by regulation to all other NSA employees. The reference to both Section 7512 and Section 7532 clearly indicates that Congress assumed that removals for cause would continue to occur even in cases with national security implications. See also 50 U.S.C. 832(b) (authorizing boards of appraisal to submit reports and make recommendations on access to classified information, but providing that "appraisal by such a board is not required before action may be taken under sections 7512 and 7532 of title 5, or any other similar provision of law").[4]

[4] Respondent (Br. 22), like the court of appeals (Pet. App. 11a-12a), quotes both these provisions, but excises the two references to Section 7512 and then asserts, based on the elided quotations, that Section 7532 is the only alternative mechanism to Section 833 for removing NSA employees on grounds of national security. But the express references to the ordinary "for cause" procedures clearly indicate Congress's intention not only that loss of a security clearance could be cause for dismissal but also that the "for cause" procedures should be used unless they "cannot be invoked consistently with the national security" (50 U.S.C. 833(a)).

3. Respondent also contends (Br. 23-24) that Section 7532 would be rendered superfluous if the Director of NSA could remove for cause an employee who lost his security clearance because in every case the Director could rely on the regulations relating to "for cause" removals to make "an end run" around the hearing requirement in Section 7532. This puts the matter backwards. Ordinary "for cause" procedures afford federal employees important protections against removal. NSA and other agencies are allowed to bypass these procedures by invoking the summary procedures of Section 7532 only in cases where there is "an immediate threat of harm to the 'national security' " such that the delay incident to the "normal dismissal procedures" could "cause serious damage to the national security." *Cole* v. *Young*, 351 U.S. at 546.

The premise of respondent's argument, as well as of the court of appeals' decision (Pet. App. 12a-13a), is that respondent would somehow receive more protection under Section 7532 than in a "for cause" removal. That premise is wrong, as we explained at some length in our opening brief (at 33-35), and as this Court recognized in *Department of Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988).[5] Respondent was kept on pay status for a period of 16 months while he received written notice, an opportunity to respond and be represented by counsel, several layers of intra-agency review, and a written decision recommending that NSA help respondent find employment in a position that did not require SCI clear-

[5] The Court in *Egan*, slip op. 14, rejected the employee's contention that he "would have received greater procedural protections under § 7532 than he received" under the Navy's "for cause" procedures—procedures comparable to those provided by NSA.

ance.[6] This treatment contrasts sharply with what respondent would have received had the "harsh and drastic" procedures of Section 7532 been invoked (*Egan*, slip op. 14): summary suspension without pay, notice only to the extent consistent with national security, a single hearing of unspecified scope, and, if the determination were made to remove him, ineligibility for any other position in the Department of Defense or, prior to consultation with OPM, for appointment elsewhere in government. Federal employees would be ill-served if Section 7532 became the standard procedure for all removals based on considerations of national security.

In any event, as respondent himself acknowledges (Br. 37), "whether NSA regulations give more or less protection than 7532 * * * can logically have no bearing on whether or not Congress mandated a 7532 hearing for security terminations." Thus, respondent's concern (Br. 38) that the Director of NSA might "revoke his own regulations and leave non-veteran excepted service employees with no procedural rights at all" is simply irrelevant. The fact that nonveterans at NSA have no statutory tenure protection does not imply that Section 7532 is the exclusive means of removing them. Section 7532 applies to employees of many agencies (see Pet. Br. 39-40), including employees in the competitive service, who do receive statutory protections in a "for cause" removal that they do not receive when Section 7532 is invoked (see Pet. Br. 35 n.21). The emergency procedure permitted by Section 7532 does

[6] To the extent that NSA regulations gave respondent "tenure" rights in his job, the requirements of due process were fully satisfied by the procedures respondent received. *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 546 (1985).

not become a mandatory procedure just because non-preference-eligible personnel of a particularly sensitive agency have no statutory protection and have been afforded "for cause" hearing rights only by agency regulation. Cf. *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988), slip op. 8-9 (employees who are deliberately excluded from the comprehensive remedial scheme of the CSRA may not obtain from other statutory sources the protections denied them in the CSRA).[7]

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
AUGUST 1988

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[7] This Court's recent decision in *Webster* v. *Doe*, No. 86-1294 (June 15, 1988), has no bearing on the issue presented in this case. In *Webster* v. *Doe*, the Court held that the termination authority of the Director of the CIA, 50 U.S.C. 403(c), did not preclude judicial review of colorable constitutional claims arising out of the Director's exercise of that authority. This case, however, at least in its present posture, concerns only whether the Director of NSA used the proper statutory authority in terminating respondent. The court of appeals, because of its resolution of this statutory question, found it unnecessary to consider whether respondent's constitutional claims were reviewable (Pet. App. 15a). Indeed, the court of appeals' construction of the statutes at issue in this case appears to have been motivated, to some extent, by a desire to avoid this "thorny issue" (*ibid.*). The application of this Court's recent decision in *Webster* v. *Doe* to petitioner's constitutional claims will, thus, remain open on remand.

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